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IN THE

Supreme Court of the United States

October Term 1939

No. 329

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER & CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

PETITION

(1) FOR REHEARING TOGETHER WITH INTERIM STAY OF MANDATE.

(2) ALTERNATIVELY FOR EXTENSION OF TIME WITHIN WHICH TO APPLY FOR REHEARING AND FOR STAY OF MANDATE.

RALPH M. CARSON
SAMUEL A. PLEASANTS
Counsel for Petitioners

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Upon the record, the opinion of this Court rendered February 26, 1940 (now reported in 84 L. Ed. Adv. Op. 517), and the facts herein stated, petitioners pray for rear-

gument of this case at a convenient date after the decision of the New York Court of Appeals upon the appeal now pending in *Mencher* v. *Richards;* or, in the alternative, an extension of time in which to apply for rehearing and a stay of mandate until ten days after the decision of the Court of Appeals upon said pending appeal.

The opinion in this case was rendered February 26th, and in normal course the mandate would come down on March 23, 1940.

1. Nature of the Action

This is a representative action in equity, instituted in the District Court for the Southern District of New York on December 16, 1931, by creditors of a Federal joint stock land bank to enforce the statutory liability imposed upon the defendant shareholders of that bank, petitioners in this Court, by 12 U. S. Code §812. The cause of action accrued in April 1928 (R. 354).

Judgment for plaintiffs in the District Court was affirmed by the Circuit Court of Appeals, 104 F. (2d) 169, and certiorari was granted by this Court on October 16, 1939 (R. 437), limited to the question of the application of the New York statute of limitations.

The opinion of this Court, written by Mr. Justice Stone, affirmed the decisions below. Mr. Justice Roberts dissented. Mr. Justice Murphy did not participate.

2. Basis of Decision of this Court

The initial ground of decision in the courts below was, as stated by Mr. Justice Stone, "that the suit was ex-

clusively within the equity jurisdiction of the court." The opinion of this Court accepts and concurs in this conclusion, holding the action under the Federal Farm Loan Act to be exclusively of equitable cognizance and not to be predicated upon a legal cause of action.

The second ground of decision in the courts below was that the equity doctrine of laches should be applied to the exclusion of the statute of limitations, and that upon the evidence respondents were not guilty of laches. Although the question of laches on the evidence was not permitted to be argued in this Court under the order granting certiorari (R. 437), this Court overruled the conclusion below that laches applied to the exclusion of limitations, and held that the New York statute of limitations should be applied if it should appear with reasonable certainty that there is a State statute applicable to like causes of action (84 L. Ed. Adv. Op. at 523-4).

Having reversed the basis of decision below, this Court in its opinion thereupon examined the New York statutes and decisions, and came to the conclusion that the New York three-year statute of limitations (the only statute which upon the facts could have barred the action) did not appear with reasonable certainty to be applicable to this action. The lower courts, in applying the doctrine of laches, had measured it upon the three-year statute of limitations (R. 35,423) as being the statute which would govern if any were applicable. This Court deemed the ten-year statute to be that probably applicable under the New York law.

In reaching this conclusion, Mr. Justice Stone pointed out that the precise question thus raised appeared not to have been decided by the New York Court of Appeals, and

in the absence of a controlling decision by the highest appellate court relied upon language of the Appellate Division, Second Department, in *Mencher* v. *Richards*, 256 A. D. 280, which he deemed to be supported by the reasoning of the Court of Appeals in *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86 and *Potter* v. *Walker*, 276 N. Y. 15 (84 L. Ed. Adv. Op. at 523).

3. Grounds on which Rehearing is Sought

This application is made primarily for the purpose of giving petitioners adequate opportunity of presenting the law of New York on the subject of limitations (now for the first time in this case held by this Court to be controlling), in view of the leave to appeal which has just been granted by the Appellate Division, Second Department, upon another phase of *Mencher* v. *Richards* and in view of the fact that such appeal will come on in the New York Court of Appeals about April 8, 1940. With only such detail as Rule 33 permits we respectfully urge:

(a)

The primary reliance of respondents in opposing application of the three-year statute was the opinion rendered by a majority of the Appellate Division, Second Department, on February 17, 1939, in *Mencher* v. *Richards*, 256 A. D. 280, as to which the same court denied leave to appeal on March 25, 1939, 256 A. D. 1003. This was a stockholder's action against directors of a moneyed corporation. The ruling of the Appellate Division was upon cross-motions to strike defenses and portions of the complaint in complicated pleadings comprising 90 pages of the printed appeal papers.

As defendants were directors of a moneyed corporation, there was arguably applicable the three-year statute of limitations, Civil Practice Act § 49 subd. 4, providing so far as material:

> "§ 49. Actions to be commenced within three years.
>
> The following actions must be commenced within three years after the cause of action has accrued:
>
> * * * * * * * * *
>
> 4. An action against a director or stockholder of a moneyed corporation, or banking association, . . . to enforce a liability created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which . . . the liability was created."

On the other hand, plaintiff argued that the ten-year statute was alone applicable. The amended complaint demanded an accounting for losses to the corporate defendant arising out of misfeasance, waste, dissipation of assets, betrayal of trust, negligence and the like; a direction that the individual defendants restore to the corporate defendant *ultra vires,* improper and unlawful loans, payments, advances and secret profits; an accounting for personal profits and gains by the individual defendants resulting from breach of their fiduciary obligations as directors; a direction that the individual defendants liquidate *ultra vires* and illegal investments of the corporation and be required to make restitution; an injunction against the continuance of illegal and *ultra vires* loans and investments by the individual defendants and the corporation; an injunction against interference by the defendants with the subject

matter of the suit; and a receivership of the assets and property of the corporate defendant.[1]

Affirming both orders below, the Appellate Division denied in part plaintiff's motion to strike out defenses of the statute of limitations, and denied defendants' motions to strike out certain paragraphs of the complaint on the ground of the statute of limitations and for judgment on the pleadings. By its very nature this was not a determination, but only a preservation of the claims of both sides for subsequent determination at the trial of the action.

In the majority opinion it was said (p. 281):

> "Although so-called equitable relief is sought, it is clear that, save for the alleged transactions resulting in personal profit, a money judgment is the only available remedy."

The majority then held that on the transactions not resulting in personal profit, the six-year statute of limitations and the three-year statute would both apply, the time of commencement of the three-year period being necessarily indeterminate because of the statutory requirement with respect to the time of plaintiff's discovery of the facts.

The majority went on to say that the three-year statute does not affect the operation of the ten-year statute, Civil Practice Act § 53,[2] governing the cause "in so far as it relates to alleged personal profits." The majority then used the language to which we respectfully submit this Court has given undue weight, *viz.* (p. 282):

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[1] Printed papers on appeal, pages 29-58.

[2] "§ 53. Limitation where none specially prescribed.
An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

> "The genesis and development of the ten-year statute make it clear that it was uniformly designed to govern equitable actions, and that doctrine has been so strongly and uniformly enunciated that a departure therefrom would require an express enactment of the Legislature, which is not to be found in the foregoing provision relating to 'liability created by the common law or by statute.'".

As the decision of the court was in substance to let the pleadings stand and reserve until the trial the application of limitations, this statement as to the ten-year statute was dictum not necessary to the decision. Moreover, if relevant, it was much too broad for the decision. The decision was merely that a claim for profits received in violation of a director's fiduciary duty, in a derivative action, is entitled to the ten-year statute. This point was settled by *Potter* v. *Walker*, 276 N. Y. 15, and has not since been contested. The decision thereon does not in any way mean, we submit, that an action to enforce *something other* than a liability to account for profits received in violation of a fiduciary duty, *viz.* an action to enforce a liability *created by statute*, would not be governed by the three-year period.

Civil Practice Act §49 subd. 4 expressly bars by three years an action to enforce "a liability created by the common law or by statute." We do not see how any court can decline to apply a bar so directly commanded by the State legislature. In *Mencher* v. *Richards* the liability was not created either by common law or by statute, but arose out of settled chancery doctrines of constructive trust.

The opinion in *Mencher* v. *Richards*, which has just been analyzed, was adopted by only three justices. The

Presiding Justice and another justice concurred in result only. Nevertheless, the Appellate Division denied leave to appeal, and under the New York practice the Court of Appeals did not have power to grant leave.

(b)

However, *after the date of the argument in this Court,* namely, on January 23, 1940, the Appellate Division, Second Department, did grant leave to appeal to the Court of Appeals upon another phase of the same case, namely, whether examinations before trial should proceed with respect to matters claimed to be barred by the statute of limitations.[3]

The decision in respect of which leave to appeal has now been granted again raises the question of the appropriate statute of limitations applicable to different phases of the involved pleadings in *Mencher* v. *Richards.* The majority of the court, in modifying and affirming the order below, said:

> "This court has already held that the six-year statute of limitations formerly contained in section 48, subdivision 3, of the Civil Practice Act applies to the matters alleged in the complaint except in so far as relief peculiar to equity may be necessary (*Mencher* v. *Richards*, 256 App. Div. 280)."[4]

Two members of the court dissented, the Presiding Justice recording his dissent

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[3]New York Law Journal, January 23, 1940, page 360 (not officially reported).

[4]New York Law Journal, December 27, 1939, page 2324 (not officially reported).

". . . as to those items which it is proposed to exclude from the examination because of the defense of the six-year statute of limitations, upon the ground that examination as to those items should be allowed *because the statute applicable is section 49, subdivision 4, Civil Practice Act,* under which to determine a time limit, a trial is required; otherwise concurs."

The Clerk of the Court of Appeals informs us that the appeal on these questions will be heard in that court during the week of April 8, 1940. We have conferred with counsel for both parties on the appeal, and understand from them that the question of the applicable statutes of limitation, including the three-year statute, will necessarily be involved in the appeal. We are informed by appellant's counsel that he will contend that the action is necessarily one for a mandatory injunction and is entitled to the benefit of the ten-year statute of limitations, so that examination on all the transactions covered by the complaint should proceed without restriction.

We understand that the time required by the Court of Appeals for the decision of a question of this kind is ordinarily between three and six weeks, depending upon the calendar of the court.

It is respectfully urged that, upon a question of New York law which is of novel impression and the decision of which is determinative of the rights of parties in this Court in respect of judgments now totaling (with interest) some fifty thousand dollars, opportunity should be given for a pronouncement in the highest appellate court of New York on the point and the opinion of this Court should

be reserved and determined on reargument after the Court of Appeals has spoken. As recently as March 6, 1940 the Court of Appeals affirmed without opinion a decision of the Appellate Division, Second Department, from which the Presiding Justice dissented on the ground of the decision in *Mencher* v. *Richards,* 256 A. D. 280. *Chance* v. *Guaranty Trust Company,* 257 A. D. 1006, affirmed New York Law Journal, March 6, 1940, page 1038 (not yet officially reported).

(c)

The two Court of Appeals decisions upon which the opinion of this Court also in part relies, as supporting by their reasoning the dictum in *Mencher* v. *Richards,* do not directly pass upon the applicability of the three-year statute in any way. They are *Potter* v. *Walker,* 276 N. Y. 15, and *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.,* 270 N. Y. 86. The former was a derivative action in equity for an accounting and other relief against directors of a corporation not a moneyed corporation; the second was an action to reform policies of insurance upon the ground of fraudulent concealment. In the former case the ten-year statute was held to be applicable to some claims, the six-year statute to others; in the latter case the ten-year statute was held to be applicable to the exclusion of the six-year statute. In neither case could the three-year statute have been applied, because neither was an action against directors *of a moneyed corporation* to enforce a liability created by common law or *by statute.*

The three-year statute is conceived in language of special precision. On the other hand, the six-year statute

which was denied application in the two cases cited is general in form.[5] In consequence judicial reasoning on a choice as between the six-year and the ten-year statutes is neither certainly nor probably applicable to the question here presented of a choice between the ten-year statute and the three-year statute. The first is *residuary* in form, the second is exact in its description of this particular action, which is in turn described in this Court's opinion as

> "a suit . . . to enforce the statutory liability of shareholders of a joint stock land bank for its debts" (84 L. Ed. Adv. Op. at 518).

(d)

The opinion of this Court, in considering the question whether the three-year statute is a bar in the State courts to actions of exclusively equitable cognizance as well as to legal actions, disregards the historical analysis of the three-year statute by the New York Court of Appeals in *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185, 191-2, although we submit that that case has particular bearing on the question. The Court of Appeals there holds that the three-year statute

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[5] § 48. Actions to be commenced within six years.

The following actions must be commenced within six years after the cause of action has accrued:

1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument.

* * * * * *

3. An action to recover damages for a personal injury, except in a case where a different period is expressly prescribed in this article.

* * * * * *

5. Any action to procure a judgment on the ground of fraud. . . ."

bars actions under N. Y. Laws of 1882, Ch. 409, §125 which provides that shareholders of banks shall be individually responsible for debts of the banks "equally and ratably." These words "equally and ratably" in the Federal Farm Loan Act were the basis of respondents' argument herein for the application of the ten-year statute on the ground that they gave the case an exclusively equitable character, and are the basis of the Court's holding to that effect (see opinion, 84 L. Ed. Adv. Op. at 519). The holding of the Court of Appeals that an action to enforce liability under a statute *similarly phrased* is barred by three years means that the three-year statute governs actions of purely equitable cognizance. This is a construction of the New York statute by the highest appellate court of New York which this Court will follow on settled principles, and which can be followed in entire consistency with the power of this Court to determine whether or not this particular form of action in the Federal court is of exclusively equitable cognizance. The question here presented is one of the New York law.

(e)

It is respectfully submitted that in its discussion of New York law this Court has overlooked other pertinent material showing the application of the three-year statute to purely equitable actions. The universal scope of the three-year statute is recognized by the New York court in *Gilbert* v. *Ackerman*, 159 N. Y. 118, 121, where after citing *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185, and referring to the 1897 amendment, the court said:

> "The amendment broadened the provisions of the section so as to embrace *all causes of action against directors.*"

In the same way the Second Circuit Court of Appeals, reviewing the historical basis of the statute, said in *Hobbs* v. *National Bank of Commerce,* 96 Fed. 396, 399:

> "Its terms are now so broad as to include *every class of liabilities* of stockholders of moneyed corporations . . ."

No reference appears in the opinion of this Court to one of the latest decisions upon the applicability of the ten-year statute to an action of alleged equitable cognizance, viz. *Cwerdinski* v. *Bent,* 256 A. D. 612, affirmed without opinion by the Court of Appeals November 14, 1939 (not yet officially reported). This was a derivative stockholder's suit against the directors of Bethlehem Steel Corporation. The Court of Appeals affirmed the dismissal of the first cause of action therein upon the six-year statute, refusing to apply the ten-year statute, although the complaint alleged that the defendants had failed to perform their official duties as directors, had used their positions of trust and power as directors to forward their private and individual profit and gain, had misappropriated moneys of the corporation to themselves, had caused excessive compensation to be paid to themselves in violation of certain accounting restrictions of the bonus plan, had received payments in excess of fair and reasonable compensation, and had improperly received the bonus payments and retained them in trust for the corporation.[6] Relief was demanded that the court determine the amounts paid under the bonus plan in excess of 8% of net earnings of the corporation, after

[6]Printed papers on appeal in the Court of Appeals, pp. 25-30.

proper allowance for all expenses, including obsolescence and depletion, but not depreciation, and preferred dividends; that the court fix fair and reasonable compensation for services rendered by the defendants; that the defendants account to the corporation for all excessive and improper compensation received; and that the defendants account for all moneys received by them in excess of 8% of net earnings of the corporation after proper allowances as aforesaid.[7] On the application of the statute of limitations, plaintiff claimed that his action was essentially for an accounting and that the amounts due could not be determined without an accounting. The Special Term so held.[8] Nevertheless the Appellate Division held that *for the purpose of the statute of limitations* the action was not of purely equitable cognizance, and the Court of Appeals affirmed, two judges dissenting.

The construction which this Court has placed upon the opinion of the Appellate Division, Second Department, in *Mencher* v. *Richards* is contrary to the conclusion reached in *Van Schaick* v. *Cronin*, 237 A. D. 7, by the Appellate Division, First Department. This was an action by the State Superintendent of Insurance as liquidator of a casualty and surety company against a director of the company for malfeasance and misfeasance in office. The Special

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[7]Printed papers, pp. 37-8.

[8]Valente, *J.* said in part (p. 42): "Fixed and determinate amounts reasonably due are not ascertainable except in relation to the earnings and expenses of the corporation in conformity with the bonus plan, which again might involve an accounting. . . . An accounting action for excess profits received by the fiduciary from the corporation is therefore the only adequate remedy."

Term and the Appellate Division held the three-year statute of limitations to be a defense against a motion to strike. In so doing the Special Term quoted *Gilbert* v. *Ackerman, supra,* as to its comprehensive character, referred to the historical background, and said:

> "From this it is self-evident that *whether the action be at law or in equity* the three-year limitation applies to govern the time in which it must be commenced against a director of a moneyed corporation."[9]

The Special Term also said in support of the applicability of the three-year statute:

> "The substance of the argument is that, even though the suppliant may be entitled to some equitable relief, if his right thereto is one covered by some specific statute of limitations other than the general ten-year statute ordinarily applied to equitable causes, the ten-year statute must yield to *the one directly referring to the cause of action.*"

The Appellate Division, First Department, affirmed unanimously with the statement that the court at Special Term "properly held such defense good."

4. Equities of the Petitioners

The purpose of this application is to obtain more adequate opportunity for a correct determination in this Court

[9] New York Law Journal, August 17, 1932, p. 584; not officially reported.

of the New York law now for the first time held to be applicable to the effect of delay upon the rights of the parties. As the finding of this Court on that point rests principally upon an intermediate appellate opinion, it is urged that the interest of justice requires that petitioners have opportunity to present the New York law fully after the Court of Appeals shall have passed on the appeal now granted in the case relied upon here. Should the substantial judgments now standing against the petitioners be paid into court and dispersed to creditors and their attorneys, a later declaration of the New York law in the sense for which petitioners have contended, will be of small benefit to them. The three-year statute of limitations for claims of this kind represents as definite a pronouncement of public policy on the subject as does the increasing tendency of legislatures to repeal the double liability of stockholders. Finally, it may not be amiss again to point out that, while the petitioners as stockholders have lost their entire investment in the bank, the only parties on the other side whose investment has been disclosed are shown to have received already in dividends more than they paid for their bonds (R. 317, 373).

Conclusion

It is prayed that this cause be set down for reargument by the Clerk of this Court for the earliest available session of this Court following the decision of the Court of Appeals in *Meucher* v. *Richards*, not earlier than ten days after such decision, and that the mandate of this Court be stayed until decision upon the reargument; or in the alternative that the mandate be stayed and petitioners' time

to petition for a rehearing be extended until ten days after the decision of the New York Court of Appeals in *Mencher* v. *Richards*.

Respectfully submitted,

RALPH M. CARSON
SAMUEL A. PLEASANTS
Counsel for Petitioners

March 21, 1940.

Certificate under Rule 33

RALPH M. CARSON, one of the attorneys for the petitioners, certifies that he is a member of the bar of this Court; that he has prepared the foregoing petition and is familiar with all the facts stated therein; and that the foregoing petition is submitted in good faith and not for purposes of delay.

New York, N. Y., March 21, 1940.

RALPH M. CARSON